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No. 08-1321

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

STATE OF NEW YORK,

Petitioner,

v.

ANTHONY ROMEO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a nineteen-year post-indictment delay in prosecution violates a defendant's constitutional right to a speedy trial where the prosecutor initially elects to defer prosecution until completion of foreign judicial proceedings, and then fails even to make an extradition request despite being aware of the defendant's incarceration in a foreign jurisdiction that is party to an extradition treaty permitting his extradition to the United States.

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OPINIONS BELOW

The opinion of the State of New York Court of Appeals (Pet. App. 1a-11a) is reported at 12 N.Y.3d 51 (2009). The opinion of the New York Supreme Court, Appellate Division, Second Department (Pet. App. 12a-18a) is reported at 47 A.D.3d 954, 849 N.Y.S.2s 666 (2d Dep't 2008). The memorandum decision and order of the County Court of Suffolk County, dated December 4, 1999 (Pet. App. 19a-23a), is not reported.

JURISDICTION

The judgment of the State of New York Court of Appeals was entered on February 11, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATEMENT

In March 1987, Anthony Romeo was indicted for murder in the second degree by a Suffolk County, New York grand jury. Although Mr. Romeo repeatedly demanded a speedy trial, the Suffolk County District Attorney's Office elected to have Mr. Romeo extradited to and tried in Canada on unrelated charges—even though the Suffolk County charges related to an incident that predated the subject of the Canadian charges. Mr. Romeo was subsequently convicted and incarcerated in Canada. In 1999, while still imprisoned in Canada, Mr. Romeo moved to dismiss the Suffolk County indictment on constitutional and statutory speedy trial grounds. IIis motion was denied, and he was not arraigned on the Suffolk County charges until November 2005,

nineteen years after his indictment. In February 2006, Mr. Romeo entered a plea of guilty to manslaughter in the first degree. He was sentenced to a term of imprisonment of seven to twenty-one years.

The New York Supreme Court, Appellate Division, Second Department reversed the conviction and dismissed the indictment, holding that Petitioner's delay in prosecuting Mr. Romeo had violated his right to a speedy trial. The State of New York Court of Appeals affirmed.

1. In November 1985, Suffolk County police discovered the body of John Starkey, who had been fatally shot. Approximately one year later, in January 1987, the Suffolk County District Attorney's Office obtained a court order authorizing hair and blood samples to be taken from Mr. Romeo for comparison with physical evidence recovered by the police. Mr. Romeo left the country for Canada before the samples could be obtained.

Shortly thereafter, on March 8, 1987, Mr. Romeo returned to the United States and was arrested in Boston, Massachusetts, where he was held on charges that he had fatally shot a Canadian highway patrol officer in New Brunswick, Canada. The Canadian government formally requested that he be brought to Canada to stand trial on those charges. As a result, a federal district court in Boston ordered that Mr. Romeo be held without bail pending an extradition hearing.

On March 27, 1987, while Mr. Romeo was still in United States custody in Boston, a Suffolk County grand

jury returned an indictment against Mr. Romeo in connection with the November 1985 murder of John Starkey. On April 1, 1987, just five days after the indictment was returned, while Mr. Romeo was still in United States custody, Mr. Romeo's counsel wrote to the Suffolk County District Attorney's Office and unequivocally asserted Mr. Romeo's right to a speedy trial. On the same day, Mr. Romeo's counsel sent a separate letter to the attorney at the United States Department of Justice responsible for the extradition proceedings in Boston, with a copy to the Suffolk County District Attorney's Office, reiterating Mr. Romeo's request for a speedy trial.

On March 31, 1987 and April 28, 1987, the district court held extradition hearings in Boston and ordered that Mr. Romeo be extradited to Canada. However, in response to the letter of Mr. Romeo's counsel dated April 1, 1987, the United States Department of Justice advised Mr. Romeo's counsel that the United States could defer Mr. Romeo's extradition to Canada because of the indictment pending in Suffolk County. Thus, if the Suffolk County District Attorney's Office had wanted to prosecute Mr. Romeo before he was extradited to Canada, it could have done so. Yet, even though Mr. Romeo remained in United States custody while he appealed the extradition order, the Suffolk County District Attorney's Office declined to prosecute him, electing instead to defer its prosecution until completion of the Canadian proceedings.

During the pendency of his appeal of the extradition order and in furtherance of his efforts to secure a speedy trial, Mr. Romeo sought to compel Petitioner to proceed

with his arraignment and trial. On May 29, 1987, he moved for an order, pursuant to a provision of New York's Criminal Procedure Law, directing the Suffolk County District Attorney to apply for a writ of *habeas corpus ad prosequendum* to produce the defendant forthwith for arraignment on the indictment. During the hearing on Mr. Romeo's motion, held on June 15, 1987, Mr. Romeo reiterated his demand for an arraignment and speedy trial. The District Attorney resisted Mr. Romeo's efforts to be returned to New York from Boston to face the Suffolk County charges, arguing that the court could not compel the District Attorney to produce the defendant in New York. The Assistant District Attorney advised the court that the District Attorney's Office was electing to defer its prosecution of Mr. Romeo until after Canadian authorities had completed their prosecution of Mr. Romeo, and argued that Mr. Romeo would suffer no delay as a result of the decision to defer the Suffolk County arraignment and trial in favor of the Canadian prosecution.

The court denied Mr. Romeo's May 1987 application for an order directing Petitioner to produce the defendant for arraignment in Suffolk County, concluding that the court could not compel the District Attorney to produce an out-of-state defendant for prosecution. In so doing, the court cautioned the District Attorney's Office both orally and in a written decision that the District Attorney would have to accept the potential ramifications of any decision to defer its prosecution of Mr. Romeo, and that the decision to defer the prosecution could result in a violation of Mr. Romeo's right to a speedy trial. Pet.App. 7a. Thereafter, Mr. Romeo was extradited to Canada.

2. Mr. Romeo was convicted on the Canadian charges in 1987 and sentenced to a term of imprisonment of twenty-five years to life, with eligibility for parole in 2012. On July 23, 1999, while still incarcerated in Canada and more than twelve years after the District Attorney's Office advised the court that Mr. Romeo would suffer no delay by facing the Canadian charges first, Mr. Romeo moved to dismiss the Suffolk County indictment on speedy trial grounds. He still had not even been arraigned on the Suffolk County charges. Moreover, although the Assistant District Attorney had assured the court in 1987, while Mr. Romeo was still in United States custody, that the District Attorney's Office would take all steps necessary to have the defendant returned to the United States following his prosecution in Canada, Petitioner had failed even to request his extradition. In opposition to Mr. Romeo's motion to dismiss, Petitioner argued that even though it never made an extradition request, its failure to do so should be excused because such a request would have been futile. In a brief memorandum opinion, the County Court, Suffolk County, adopted Petitioner's argument and denied Mr. Romeo's motion. Pet.App. 19a-23a.

3. In November 2005, after Canadian authorities temporarily surrendered Mr. Romeo to the United States, Mr. Romeo was arraigned on the Suffolk County charges. On February 2, 2006, as part of a plea agreement, Mr. Romeo entered a plea of guilty to manslaughter in the first degree, and on February 16, 2006, the County Court, Suffolk County, imposed a term of imprisonment of seven to twenty-one years to run concurrently with the Canadian sentence.

4. The New York Supreme Court, Appellate Division, Second Department reversed the conviction and dismissed the indictment, holding that Petitioner's delay in prosecuting Mr. Romeo had violated his right to a speedy trial. Specifically, the court held that Petitioner's decision to defer prosecuting Mr. Romeo in favor of the Canadian prosecution, and its subsequent failure to make an extradition request to Canada, caused the "extraordinary delay" that violated Mr. Romeo's constitutional right to a speedy trial. Pet.App. 17a-18a.

The State of New York Court of Appeals affirmed. In so doing, the court concluded, "The genesis of this extraordinary delay was the People's decision to defer the prosecution, allowing the defendant to be sent abroad for a foreign murder prosecution, and then failing to make an extradition request to Canadian authorities, which, if granted, might have mitigated the length of the delay." Pet.App. 6a. The court further found that at the time Petitioner elected to defer its prosecution, it "knew or should have known that there was no guarantee that [Mr. Romeo] would be brought back to Suffolk County in a timely manner," *id.* at 7a, and emphasized that Petitioner had an obligation to "make diligent, good faith efforts to secure [Mr. Romeo's] presence in the state for arraignment and trial." The court specifically rejected Petitioner's contention that a formal extradition request to Canada would have been futile: Petitioner was

> advised that the extradition treaty in effect would have enabled the People to request [Mr. Romeo]'s extradition, which the Canadian authorities had the discretion to grant or

> defer until the completion of [Mr. Romeo]'s sentence. . . . [N]othing in th[e] record demonstrates that a[n] [extradition] request [to the Canadian government] would have been futile.

Id. at 7a-8a.

REASONS FOR DENYING THE PETITION

Petitioner seeks review of the holding of the State of New York Court of Appeals, which held that Petitioner's decision to defer prosecution of Mr. Romeo in order to allow him to be tried in Canada first, its subsequent failure to seek Mr. Romeo's extradition from Canada, and the prejudice caused by the post-indictment delay, violated Mr. Romeo's constitutional right to a speedy trial. That holding is correct, does not raise an unresolved question of federal law that should be settled by this Court, and does not conflict with any other decision of this Court, any United States Court of Appeals, or any state court of last resort. Further review of Petitioner's claim is therefore unwarranted.

1. Petitioner contends (Pet. 15-20) that Mr. Romeo's constitutional right to a speedy trial was not violated because Mr. Romeo was partially responsible for the delay in his arraignment and prosecution. Specifically, Petitioner argues that Mr. Romeo, rather than Petitioner, caused the delay because "the Canadian murder was the genesis for all of the delay in prosecuting the New York murder," Pet. at 17. According to Petitioner, the State of New York Court of Appeals failed to give proper weight to Mr. Romeo's "proportionate responsibility." *Id.* at 15.

The Court of Appeals properly concluded that the delay suffered by Mr. Romeo was caused by Petitioner, not by Mr. Romeo. Pet.App. at 6a. In reaching this conclusion, the Court correctly emphasized that even before Mr. Romeo was extradited to Canada, Petitioner

> had been placed on notice that their decision [to defer his prosecution] might violate [Mr. Romeo]'s constitutional speedy trial rights, as [Mr. Romeo] was already making claims that he was being prejudiced by the delay. In the face of these warnings, [Petitioner] still allowed [Mr. Romeo] to be prosecuted abroad before even arraigning him on the Suffolk County charges.

Id. at 7a. The Court of Appeals further considered the fact that, "even if acting under the mistaken belief that [Mr. Romeo]'s presence could be obtained in Suffolk County promptly after the Canadian trial, [Petitioner] knew or should have known that there was no guarantee that defendant would be brought back to Suffolk County in a timely manner." *Id.* Finally, the Court of Appeals properly concluded that under the terms of the Treaty between the United States and Canada, Petitioner could have requested Mr. Romeo's extradition following the Canadian trial, "which the Canadian authorities *had the discretion to grant or defer* until the completion of [Mr. Romeo]'s sentence." *Id.* (emphasis added). As such, the Court of Appeals correctly held that in order to avoid violating Mr. Romeo's constitutional right to a speedy trial, Petitioner was obligated to, "at the very minimum," *id.*, make a formal extradition request for Mr. Romeo's return.

a. Petitioner has a "constitutional duty to make a diligent, good faith effort" to bring a defendant to trial in a timely manner. *Smith v. Hooey*, 393 U.S. 374, 383 (1969). Here, Petitioner failed to satisfy that duty—initially, by electing to defer its prosecution of Mr. Romeo until after the Canadian proceedings and, then, by failing to make an extradition request while Mr. Romeo was incarcerated in Canada.

In 1987, while Mr. Romeo was in United States custody, Petitioner chose to defer its prosecution of Mr. Romeo. Petitioner made that choice despite an explicit warning from the court, both orally and in writing, that Petitioner's decision might impact Mr. Romeo's right to a speedy trial. Whether motivated by bad faith or sheer negligence, any delay resulting from Petitioner's decision to forego prosecution of Mr. Romeo when it clearly had the opportunity to do so must be attributed to Petitioner, not to Mr. Romeo. *See Barker v. Wingo*, 407 U.S. 514, 531 (1972) (the "ultimate responsibility," even for delay resulting from "negligence," "must rest with the government rather than with the defendant").

There is no question that Petitioner could have prosecuted Mr. Romeo on the Suffolk County charges before he was returned to Canada, if it had wanted to do so. Indeed, Petitioner does not argue otherwise. In fact, in opposing Mr. Romeo's May 1987 motion to compel the District Attorney to produce the defendant forthwith for arraignment on the indictment, the Assistant District Attorney advised the court that the District Attorney's Office had elected to defer Mr. Romeo's prosecution until after Canadian authorities could proceed on the Canadian charges, and assured

the court that Mr. Romeo would not suffer any additional delay in his prosecution on the Suffolk County charges as a result of being tried in Canada first.

Even assuming that Petitioner truly believed, in May 1987, that it could promptly secure Mr. Romeo's return to the United States when it chose to defer its prosecution of him, but subsequently learned otherwise, Petitioner is still responsible for the delay. Petitioner has an obligation not only to act in good faith, but to exercise diligence in ensuring that the defendant receives a speedy trial. *See Hooey*, 393 U.S. at 383; *see also Barker*, 407 U.S. at 527. Thus, it was incumbent upon Petitioner to ascertain fully and accurately the feasibility of securing Mr. Romeo's return before it made the choice to forego his prosecution. Any delay resulting from Petitioner's negligence in doing so must be attributed to Petitioner, not to Mr. Romeo. *See Barker*, 407 U.S. at 527, 531 (holding that the State, not the defendant, has the duty of ensuring a speedy trial).

b. Even after Mr. Romeo was extradited to and incarcerated in Canada, Petitioner failed to secure his return for nearly nineteen years. The law is clear that a defendant's incarceration in another jurisdiction does not excuse a delay in his prosecution. *See Hooey*, 393 U.S. at 382-83. Thus, where a defendant is incarcerated in a foreign country that is party to an extradition treaty permitting his extradition to the United States, unless the State can demonstrate that a request for his return would be futile, the State must make an effort to secure his presence for trial by seeking his extradition. *See United States v. Pomeroy*, 822 F.2d 718, 721-22 (8th Cir. 1987); *United States v. McConahy*, 505 F.2d 770, 773 (7th Cir. 1974); *United States v. McDonald*, 172 F. Supp. 2d 941, 948-949 (W.D. Mich. 2001).

As Petitioner implicitly acknowledges, the terms of the Extradition Treaty between the United States and Canada gave Canadian authorities the discretion to grant or defer an extradition request for an individual incarcerated in Canada. The Treaty provides that:

> When the person whose extradition is requested is being proceeded against or is serving a sentence in the territory of the requested State for an offense other than that for which extradition has been requested, his surrender *may* be deferred until the conclusion of the proceedings and the full execution of any punishment he may be or may have been awarded.[1]

Pet.App. at 30a-31a (emphasis added). *See also Pomeroy*, 822 F.2d at 721.

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1. Although the Canadian Extradition Act, prior to its 1999 amendment, provided that an individual serving a sentence in Canada "shall not be surrendered until after he has been discharged," this provision of the Act did not change Canada's authority under the Extradition Treaty to surrender an individual incarcerated in Canada. This provision of the Extradition Act did not affect the discretion granted by the Extradition Treaty because Section 3 of the Extradition Act states that "no provision of this Part that is inconsistent with any of the terms of the [extradition treaty] has effect to contravene the [treaty] . . . ." Extradition Act, Can. Rev. Stat. Ch. 322, Part I, § 3 (1985). Under Canadian law—namely, Section 3 of the Extradition Act—it is clear that where a conflict exists between an extradition treaty and the Canadian Extradition Act, the treaty prevails. *See Pomeroy*, 822 F.2d at 721; Paul Michell, *Domestic Rights and International Responsibilities:* (Cont'd)

Because the Extradition Treaty permitted Mr. Romeo's extradition to the United States, Petitioner was obligated to request his extradition unless such a request would have been futile. *See McConahy*, 505 F.2d at 773; *Pomeroy*, 822 F.2d at 721. The burden rests on Petitioner to demonstrate that an extradition request would have been futile. *See McConahy*, 505 F.2d at 773; *see also Pomeroy*, 822 F.2d at 721-722. Petitioner has not satisfied, and cannot satisfy, this burden.

The correspondence received by the District Attorney's Office from Canadian authorities and the United States Department of Justice belies any claim of futility. In a May 1987 letter from the Canadian Department of Justice, the General Counsel of the Criminal Prosecutions Section stated that a formal extradition request required the initiative of the District Attorney's Office and explained that, if an extradition request were made, the Canadian Minister of Justice would then have the discretion under the Extradition Treaty to extradite Mr. Romeo before his Canadian sentence was completed. The General Counsel advised that Canadian authorities have exercised such discretion

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(Cont'd)

Extradition Under the Canadian Charter, 23 Yale J. Int'l L. 141, 165 (1998) (noting that the Extradition Act "clearly states" that an extradition treaty trumps any inconsistent provisions of the Extradition Act); Sharon Williams, *The Double Criminality Rule and Extradition: A Comparative Analysis*, 15 Nova L. Rev. 581, 583 (1991) (noting that an extradition treaty prevails over inconsistent provisions of the Extradition Act). The District Attorney's Office was expressly advised by Canadian officials in 1987 that Section 3 of the Extradition Act made the Treaty the prevailing law.

in some cases. Thus, the letter made clear to the District Attorney's Office that extradition of Mr. Romeo was a viable option and, in fact, would not have been unprecedented. Pet.App. at 3a.

Further contravening any claim of futility, the General Counsel expressly indicated a potential willingness on behalf of the Minister of Justice to extradite Mr. Romeo. In fact, the General Counsel advised that the fact that New York State and United States officials had assisted Canada in bringing Mr. Romeo to trial in Canada would weigh in *favor* of Canada agreeing to extradite Mr. Romeo to New York. Thus, although extradition was not a foregone conclusion, there can be no dispute that it was a viable possibility, particularly if the Suffolk County authorities had expressed a desire for Mr. Romeo's return.

Moreover, in March 1989, Petitioner received a letter from the Department of Justice that reiterated that extradition remained a potentially viable means of securing Mr. Romeo's presence in New York for trial. The letter identified three means of obtaining Mr. Romeo's presence for arraignment and trial in Suffolk County. One of these means was a straightforward extradition request to be made by Suffolk County through the United States government. The letter noted that if Suffolk County requested Mr. Romeo's extradition, Canada could extradite him even before completion of his sentence, but speculated that commutation of his Canadian sentence was "not very likely" given the nature of the Canadian offense. Nothing in the record indicates that this conjecture by the DOJ attorney was based on any communications with

Canadian authorities, who previously had indicated a willingness, on more than one occasion, to release Mr. Romeo prior to completion of his Canadian sentence.

Thus, this case stands in marked contrast to *United States v. Walton*, 814 F.2d 376 (7th Cir. 1987), where the court found that a formal extradition request would have been futile. In *Walton*, the government approached Swedish officials on multiple occasions and was told unambiguously, *by Swedish officials*, that Sweden would not release Walton. Additionally, according to a contemporaneous memo from the Department of State, Swedish officials "*unequivocally* stated that Sweden is not interested in sending Mr. Walton to the United States until he has completed his full term." *Id.* at appx. 1 (emphasis added); *see also United States v. Blanco*, 861 F.2d 773, 778 (2d Cir. 1988) (holding that a request for extradition of Colombian national would have been futile where Colombia refused to extradite its nationals and the President of Colombia made clear that he would not enforce extradition treaty).

Nothing in the record suggests that Canada expressed such a sentiment in this case, or that Petitioner's supposed belief that extradition was unlikely was based on anything other than rank speculation. Indeed, the communications from the relevant Canadian authorities indicated that extradition requests had been granted in analogous situations and that the Minister might be willing to do so in Mr. Romeo's case as well. Because the record makes clear that "it might have been possible" to secure Mr. Romeo's presence in New York, *McConahy*, 505 F.2d at 773, Petitioner had a constitutional obligation to at least *request* Mr. Romeo's

extradition. *See id.* (because there was a possibility that England would have returned the defendant to the United States before the completion of his British sentence, government violated right to speedy trial by failing to seek his return); *Hooey*, 393 U.S. at 382 ("The possibility of a refusal is not the equivalent of asking and receiving a rebuff." (quotation marks omitted)); *Pomeroy*, 822 F.2d at 721-722 (fact that Canada had discretion to defer extradition until after defendant served sentence in Canada did not excuse government's failure to make formal extradition request); *McDonald*, 172 F. Supp. 2d at 948-949 (fact that Bahamian government might have elected to defer extradition until after resolution of local charges did not justify failure to request extradition); *United States v. Rowbotham*, 430 F. Supp. 1254, 1257 (D. Mass. 1977) ("That Canada may not honor an extradition request is no excuse for failing to make one.").

2. Petitioner further contends (Pet. at 24) that Mr. Romeo is responsible for the delay in his arraignment and prosecution because he "never requested a transfer to serve his Canadian sentence in the United States." *Id.* at 24. Both the New York Supreme Court, Appellate Division, Second Department, and the State of New York Court of Appeals properly rejected this argument.

First, if Mr. Romeo had requested a transfer under the Exchange of Prisoners Treaty, that request would have been subject to approval by Canada and the United States authorities. To be sure, a request for Mr. Romeo's return to the United States would have been more likely to succeed if made by Petitioner than by Mr. Romeo himself.

Second, even aside from the inefficacy of such an approach, Petitioner cannot excuse its own failure to exercise diligence by improperly shifting its burden onto the defendant. Although a defendant cannot take affirmative action to hinder a speedy trial, such as evading arrest or contesting his extradition, *United States v. Sandoval*, 990 F.2d 481, 485 (9th Cir. 1993), the constitution does not require him to take affirmative action to facilitate his return. In fact, a "defendant has no duty to bring himself to trial; the State has that duty . . . ." *Barker*, 407 U.S. at 527. Petitioner cannot fail to seek extradition for nearly twenty years and then claim that its inaction is justified simply because Mr. Romeo might have been able to effectuate his own return.

3. Petitioner also contends (Pet. at 24) that Mr. Romeo's constitutional right to a speedy trial was not violated because Mr. Romeo's right to a speedy trial was not "aggressively asserted." *Id.* at 24. The State of New York Court of Appeals correctly rejected Petitioner's argument, which is contrary to the factual record.

Although a defendant does not waive his right to a speedy trial by failing to make a demand, one of the factors to be weighed in evaluating a speedy trial claim is whether the defendant has asserted his right to a speedy trial. *See Barker*, 407 U.S. at 528. As the State of New York Court of Appeals correctly noted, beginning in 1987, Mr. Romeo "made a series of formal demands to [Petitioner] for an immediate arraignment and trial on the Suffolk County indictment. He made a similar demand to the United States Department of Justice, asserting his constitutional right to a speedy trial." Pet.App. at 2a. Moreover, while in U.S. custody, Mr.

Romeo filed a motion seeking to *compel* the Suffolk County District Attorney to produce him for arraignment and trial. And in 1999, Mr. Romeo again asserted his right to a speedy trial by moving to dismiss the indictment on speedy trial grounds. Thus, Mr. Romeo clearly, unequivocally and aggressively asserted his right to a speedy trial.

Indeed, Petitioner does not dispute this factual record. Instead, Petitioner argues that after being extradited to Canada, and tried and imprisoned in Canada, Mr. Romeo waited 12 years to

> ma[k]e the single motion to dismiss. While serving his Canadian sentence, respondent never requested a transfer to serve his Canadian sentence in the United States. These actions were not consistent with that of a person who truly wanted a speedy trial in New York. . . . [Mr. Romeo]'s posture as an aggrieved defendant who wanted his day in court remains inauthentic and contrived to this day.

Pet. at 24. Essentially, Petitioner argues that despite the factual record clearly demonstrating that Mr. Romeo repeatedly asserted his right to a speedy trial, and demanded that he be arraigned and brought to trial in New York, Mr. Romeo did not actually *want* a speedy trial. Petitioner does not cite a single case in support of this argument, which was correctly rejected by the State of New York Court of Appeals.

Mr. Romeo clearly asserted his right to a speedy trial. As discussed above, after asserting his right to a speedy trial, Mr. Romeo was not required to take steps to serve his Canadian sentence in the United States. Nor was he required to make a motion to dismiss the indictment on speedy trial grounds repeatedly, or within a shorter time frame than 12 years. Indeed, nothing more was required of him. Petitioner cannot escape the factual record, and overcome its own failure to accord Mr. Romeo his constitutional right, by arguing that despite Mr. Romeo's demands for a speedy trial, Mr. Romeo did not actually *want* a speedy trial.

4. Petitioner also contends (Pet. at 34) that the extraordinary delay experienced by Mr. Romeo was not an impairment to his defense of the charges in the indictment. This argument was correctly rejected by the State of New York Court of Appeals, which specifically concluded that "it is highly likely that [Mr. Romeo's] defense was 'impaired' by [his] incarceration for many years in a foreign prison where it would have been difficult for him to participate in his own defense, confer with counsel and contact witnesses." Pet.App. at 10a (quoting *Hooey*, 393 U.S. at 374).

A lengthy delay is presumptively prejudicial even in the absence of proof of actual prejudice. *Doggett v. United States*, 505 U.S. 647 (1992). Thus, an affirmative demonstration of prejudice is not necessary to establish a violation of a defendant's constitutional right to a speedy trial. *Moore v. Arizona*, 414 U.S. 25, 26 (1973); *Doggett*, 505 U.S. at 655. This Court has explained that a lengthy delay is not "tolerable simply because the accused cannot demonstrate exactly how it has

prejudiced him." *Doggett*, 505 U.S. at 657. An excessive delay is presumptively prejudicial because with the passage of time, neither party can be expected to prove the presence or absence of prejudice. *Id.* at 655; *see also Barker*, 407 U.S. at 532 (noting that a defendant may not be able to demonstrate the prejudice suffered as a result of delay because "what has been forgotten can rarely be shown"). The importance of such presumptive prejudice increases with the length of the delay. *Doggett*, 505 U.S. at 656. The 19-year delay in this case is sufficiently extraordinary that it gives rise to a presumption of prejudice.

Moreover, Mr. Romeo has suffered actual prejudice as a result of Petitioner's delay. As this Court has noted, "it is self-evident that the possibilities that long delay will impair the ability of an accused to defend himself are markedly increased when the accused is incarcerated in another jurisdiction." *Hooey*, 393 U.S. at 379-380 (quotation marks omitted). The impairment to the defense is particularly acute here because the delay not only diminished, but effectively eliminated, Mr. Romeo's ability to establish a defense based on a lack of criminal responsibility by reason of mental disease or defect. The record shows that Mr. Romeo was suffering severe psychiatric problems at least as early as 1987. Indeed, at the time of the extradition proceedings in Boston, the federal district court granted his application to be transferred to a prison with more suitable psychiatric facilities given the problems he was experiencing. Because such a defense would have required Mr. Romeo to establish his mental incapacity *at the time of the offense*, the State of New York Court of Appeals correctly concluded that his ability to do so

was impaired by being arraigned more than twenty years after the underlying event.

Additionally, the prejudice to be considered by the court is not limited to the prejudice to his defense. *See Moore*, 414 U.S. at 26-27. Rather, prejudice should be assessed in light of the various interests that the speedy trial right is intended to protect. *See Barker*, 407 U.S. at 532. This Court has identified three such interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* The impairment of these interests is "both aggravated and compounded in the case of an accused who is imprisoned by another jurisdiction." *Hooey*, 393 U.S. at 378.

The delay in bringing to trial someone who is already incarcerated for another offense "may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge." *Hooey*, 393 U.S. at 378. For example, where the defendant is incarcerated for another offense, the delay in prosecution may ultimately increase the period of incarceration by foreclosing the possibility of at least some of the sentence being served concurrently. *Hooey*, 393 U.S. at 378. Mr. Romeo unquestionably has suffered such prejudice. If Mr. Romeo had been arraigned and tried earlier, as he demanded, he could have received credit for time served in Canadian custody. Indeed, the sentence imposed by the court below—which was not imposed until 2006 due to Petitioner's delay—is to run concurrently with the Canadian sentence, but only as of February 2006. Thus, Mr. Romeo will receive no credit for the previous nineteen years spent in custody.

In addition, this Court has expressed concern that where the defendant is incarcerated on other charges, "the duration of [the defendant's] present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him." *Hooey*, 393 U.S. at 378. That concern has also materialized in this case: Mr. Romeo's request for a work clearance, for example, was denied, and that result was influenced by the then-pending and unresolved Suffolk County indictment.

Finally, the "anxiety and concern accompanying public accusation" is no less severe merely because the defendant is incarcerated for a separate offense. *Hooey*, 393 U.S. at 379 (quotation marks omitted). Indeed, the Court has recognized that the anxiety and concern that stems from being charged with a crime can have just "as depressive an effect upon a prisoner as upon a person who is at large." *Id.* Mr. Romeo experienced this anxiety and concern relating to the Suffolk County charges for nearly two decades, during which Petitioner took no steps to have him arraigned and tried in New York.

5. Finally, Petitioner contends (Pet. at 26-28, 35-36) that the decision of the State of New York Court of Appeals upsets the balance of power by interfering with the executive branch's decisions and actions with respect to extraditions and treaties. According to Petitioner, "Treaties protect the United States' right to prosecute its cases before sending fugitives to foreign nations but there should be no requirement to do so in every case," *id.* at 27, and dismissal of the indictment on speedy trial grounds undermined the "discretionary

executive authority to decide who should be first to prosecute a multi-jurisdictional offender," *id.* at 36. This argument was properly rejected by the State of New York Court of Appeals.

As an initial matter, Petitioner's discretionary authority cannot trump Mr. Romeo's constitutionally guaranteed right to a speedy trial. "While the executive has discretion over prosecutorial decisions, it has no discretion to violate the constitutional rights of individuals. . . . [Petitioner] cannot cloak constitutional violations under the guise of prosecutorial discretion and expect the federal courts simply to look the other way." *Smith v. Meese*, 821 F.2d 1484, 1492 (11th Cir. 1987).

Moreover, The State of New York Court of Appeals did not hold that Suffolk County was *required* to arraign and try Mr. Romeo before consenting to his extradition to Canada, or that the United States did not have discretionary authority to extradite Mr. Romeo to Canada before he had been tried in New York. Instead, the State of New York Court of Appeals simply and properly held that, "[I]t was [Petitioner]'s burden to bring the defendant to trial in a timely fashion," Pet.App. at 6a (citing *Hooey*, 393 U.S. at 383), and Petitioner failed to satisfy that burden.

Mr. Romeo repeatedly demanded a speedy trial. This demand was made to both the Suffolk County District Attorney's Office, and the United States Department of Justice. In response to the demand, the United States Department of Justice advised Mr. Romeo's counsel that

the United States could defer Mr. Romeo's extradition because of the indictment pending in Suffolk County. Additionally, the Suffolk County Court warned the District Attorney's Office, both orally and in writing, that Petitioner's decision to defer prosecution of Mr. Romeo could implicate his right to a speedy trial. Nonetheless, and in the face of these warnings, the District Attorney's Office elected to defer its prosecution in favor of the Canadian prosecution. After Mr. Romeo had been extradited to Canada, Petitioner waited nearly twenty years to pursue a formal request for extradition so that Mr. Romeo could be arraigned and tried in New York.

Petitioner had discretion to defer Mr. Romeo's prosecution, and the United States certainly had the authority to extradite Mr. Romeo to Canada before he was arraigned and tried in New York. But as the Suffolk County Court plainly stated in 1987, Petitioner's discretionary decision was "one that they will have to live with." Pet.App. at 14a. "By deferring prosecution and choosing not to attempt to extradite [Mr. Romeo], [Petitioner] ran the risk of a speedy trial violation." *Id.* at 8a.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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